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HSBC BANK MALAYSIA BHD

v.

NG TIEN BENG & ORS

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HIGH COURT MALAYA, KUALA LUMPUR

ABDUL WAHAB PATAIL J

[CIVIL SUIT NO: D4-22-220-2005]

23 APRIL 2008

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CIVIL PROCEDURE: *Summary judgment - Appeal for - Claim for monies owing - Default in payments - Whether there were triable issues - Whether appeal allowed - Rules of the High Court 1980, O. 14*

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CIVIL PROCEDURE: *Summary judgment - Triable issues - Banking facilities - Default - Whether termination of facilities unlawful - Whether there was manifest error in debts calculated - Whether plaintiff required to exhaust rights on security prior to bringing claim against defendants - Rules of the High Court 1980, O. 14*

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This was an appeal against the decision of the deputy registrar refusing to grant the plaintiff's application for leave to enter summary judgment under O. 14 of the Rules of the High Court 1980. The plaintiff's case was that pursuant to various letters of offer, the terms of which were duly accepted by a company, Kian Furniture Manufacturing S/B ('KFM'), the plaintiff granted to

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KFM various banking facilities. The first and second defendants, along with one Ng Tien Woo @ Ng Thian Woo (now deceased) had agreed and guaranteed as principal debtor and not merely as surety that a certificate signed by the duly registered officer of the plaintiff as to the amount at any time owing by KFM to the

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plaintiff shall be conclusive evidence as against them of the amount so owing. KFM had utilized the said banking facilities but failed to make payment due to the plaintiff pursuant to the facilities agreement. On the request of KFM, the plaintiff by way of a letter dated 19 March 2003 ('letter of indulgence') agreed to grant KFM

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an indulgence until 31 March 2004 for settlement of the banking facilities. Again, KFM defaulted. The plaintiff terminated and recalled the banking facilities. By way of a letter dated 31 May 2004 issued to the first and second defendants and Ng Tien Woo @ Ng Thian Woo, the plaintiff demanded the payments pursuant

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to the first and second guarantees. The first defendant, second defendant as guarantors, and the second defendant as administrator of the estate of the deceased Ng Tien Woo @ Ng

Thian Woo have defaulted in making payment pursuant to the terms and conditions of the first and second guarantees and have failed, refused and/or neglected to repay the outstanding sum under the said banking facilities. The case for the defendants, however, were that the plaintiff had wrongfully terminated the banking facilities because the termination was unlawful under the new contract pursuant to the letter of indulgence since KFM had complied with terms of the said letter and that the documents showed KFM had paid in excess; there was manifest error in the debt calculated; that the plaintiff did not file a suit for recovery of the loans from KFM the borrower but only against the guarantors/defendants and that the plaintiff needed to sell the property charged as security first prior to bringing this claim against the defendants.

Held (allowing the appeal):

- (1) In an O. 14 application, the defendant needs only raise one triable issue. The key is that it must be a triable issue. A 'triable issue' is a dispute of a particular fact which might not necessarily require a trial but would require the discovery and interrogatory procedures available after close of pleadings and before a trial that enables the parties to be able to: (a) identify disputes; (b) specify the particulars of the dispute and (c) verify the evidence relied upon in respect of a disputed particular fact to ensure the court always has its facts right. If a point is merely arguable, such a question of law or an inference or conclusion of fact based on particulars that are not disputed, then it is a point for submissions in a hearing, can be dealt with in the O. 14 application itself and does not constitute a triable issue capable of denying summary judgment to the plaintiff. (para 17)
- (2) It was the defendants' submission that KFM had made payments in excess of the sums agreed in the letter of indulgence. However, a letter of indulgence is a letter of indulgence, and is not itself an agreement. It may operate as an estoppel but it does not necessarily mean that there is a binding contract. The letter of indulgence was between the plaintiff and the borrower KFM. There was no evidence KFM disputed the default and the termination. The obligations of the defendants herein arose out of their guarantees which they issued as directors of KFM as a condition imposed by the plaintiff for the purpose of effecting the banking facilities.

- A Nothing was shown or submitted as to what precise injustice or wrong was occasioned in the termination of the facilities, leading to the conclusion that the objection was a mere technicality and was immaterial. (para 19)
- B (3) A certificate of indebtedness was issued under the hand of one Lee Lay Keng, the Corporate Recovery Manager of the plaintiff. It was established law that a covenanted certificate of indebtedness was conclusive evidence of the liability and the amount a borrower has to pay, unless there was manifest error in it. Since neither his identity nor capacity was
- C disputed, then accordingly the sum certified, totaling RM1,772,538.49 was proven conclusively according to the terms of the defendants' guarantees, and they could not resile from it. On the question of manifest error, and while the
- D interest rates stated in the certificate and the claim differ from the rates in the letter of offer, a perusal of the letter of offer showed a clear and unequivocal qualification that the rates are 'subject to fluctuations at out absolute discretion and payable ...'. The intent for an absolute discretion was underscored by
- E the fact that no provision for prior written notice was made. Hence, the ground on this point must fail. (paras 22 & 23)
- (4) There was no provision in the guarantee that required the plaintiff to have first exhausted rights on the security it had
- F obtained. It was not law that a plaintiff and holder of security must first commence foreclosure proceedings. For the foregoing reasons, the appeal was allowed with costs. (para 24)

Case(s) referred to:

- Arab-Malaysian Finance Berhad v. Mohamed Hussain Yehya & Anor* [2001] 1 LNS 31 (**refd**)
- G *Bangkok Bank Ltd v. Cheng Lip Kwong* [1990] 1 CLJ 1017; [1990] 3 CLJ (Rep) 523 HC (**refd**)
- Bank Bumiputra (M) Bhd v. Esah Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC (**refd**)
- H *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 690 CA (**refd**)
- Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 SC (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 4(1), (3)

- I *For the appellant/plaintiff* - R Vinayaga; M/s Skrine
For the respondent/defendants - R Raja Seelan; M/s Raja Seelan & Assoc
Reported by Suhainah Wahiduddin

JUDGMENT**A****Abdul Wahab Patail J:**

[1] Enclosure 18 is an appeal to the judge in chambers against the decision of the deputy registrar refusing to grant the plaintiff's application for leave to enter summary judgment under O. 14 of the Rules of the High Court 1980 (PU(A) 50/1980). The appeal is dealt with by a rehearing. Having heard the parties, the court allowed the appeal with costs.

B**Case For Plaintiff****C**

[2] The case for the plaintiff is that pursuant to various letters of offer, the terms of which were duly accepted by a company called Kian Furniture Manufacturing S/B ("KFM") (formerly known as Cheng Giap Furniture Sdn. Bhd.), the last of which was the letter of offer dated 6 May 2003 ("facilities agreement"), the plaintiff granted to KFM various banking facilities including, *inter alia*, a bank guarantee facility of up to RM300,000; a term loan facility for RM399,999.92; an Import Line of up to a limit of RM1,900,000 and a Foreign Exchange Contract Line of up to a limit of RM50,000 (collectively known as the said "banking facilities").

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[3] The banking facilities are secured by:

- a) an all monies debenture dated 1 December 1994 over the fixed and floating assets of Cheng Giap Furniture Sdn Bhd;
- b) a 2nd legal charge dated 1 December 1994, over the property held under GM57, Lot 841, Mukim of Damansara, District of Petaling;
- c) a Joint and Several Guarantee dated 25 September 1994 (1st guarantee) executed by all directors of KFM, being respectively Ng Tien Beng, Ng Hiak Hing & Ng Tien Woo for RM2.5million;
- d) a joint and several guarantee dated 8 May 1998 (2nd guarantee) executed by all directors of KFM, being respectively Ng Tien Beng, Ng Hiak Hing & Ng Tien Woo for RM300,000.

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A [4] The 1st, 2nd defendants and Ng Tien Woo @ Ng Thian
Woo agreed and guaranteed as principal debtor and not merely as
surety, they agreed that a certificate signed by the duly registered
officer of the plaintiff as to the amount at any time owing by KFM
to the plaintiff shall be conclusive evidence as against them of the
B amount so owing.

[5] KFM had utilized the said banking facilities but failed to
make payment due to the plaintiff pursuant to the said facilities
agreement. On the request of KFM, the plaintiff by way of a letter
C dated 19 November 2003 (“letter of indulgence”) agreed to grant
KFM an indulgence until 31 March 2004 (“indulgence period”) for
settlement of the banking facilities subject to terms and conditions.
Again KFM defaulted. The plaintiff by way of its solicitor’s letter
to KFM, dated 31 May 2004, terminated and recalled the banking
D facilities. KFM failed, refused and/or neglected to repay the
outstanding sum under the said banking facilities or any part
thereof.

[6] KFM has made part payment of the term loan which has
E been accepted by the plaintiff, on a without prejudice basis and
reserved their right to claim the outstanding debt due.

[7] By way of a letter dated 31 May 2004, issued by its
solicitors Messrs. Skrine, to the 1st, 2nd defendants and Ng Tien
Woo @ Ng Thian Woo, the plaintiff demanded the following
F payments pursuant to the 1st and the 2nd guarantees:

- a) Payment of the total sum of RM1,772,538.49 due as at 23
May 2004 together with interest thereon from 24 May 2004
until the date of full payment; and
- G b) Cash cover amounting to RM43,000 for bank guarantees
issued.

[8] Ng Tien Woo @ Ng Thian Woo had passed away on 12
September 2001 and letters of administration dated 17 February
H 2003 had been granted to the 2nd defendant, appointing the 2nd
defendant as the administrator of the estate of the 3rd defendant.
In consequence thereof, a letter dated 29 July 2004, was issued
by its solicitors, Messrs. Skrine, to the 2nd defendant as
administrator of the 3rd defendant’s estate, which demanded full
I payment of the debt.

[9] The 1st defendant and the 2nd defendant as guarantors, and the 2nd defendant as administrator of the estate of Ng Tien Woo @ Ng Thian Woo have defaulted in making payment pursuant to the terms and conditions of the 1st and 2nd guarantees and have failed, refused and/or neglected to repay the outstanding sum under the said banking facilities.

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Case For Defendants

[10] The case for the defendants are:

- a. The plaintiff wrongfully terminated the banking facilities;
- b. There is manifest error in the debt calculated;
- c. The plaintiff needs to sell the property charged as security first prior to bringing this claim against the defendants.

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[11] On the first ground, the defendants submitted the demand dated 31 May 2004 is a wrongful demand as it purported to retrospectively terminate the banking facilities granted to KFM at an earlier date ie, as at 23 May 2004.

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[12] It was also submitted that the termination was wrongful and unlawful under the new contract pursuant to the letter of indulgence of 19 September 2003 since KFM had complied with the terms of the said letter. Comparing the letter of indulgence stating the sum owed was RM2,158,417.69 as at 19 November 2003, and on 23 May 2004 the sum was RM1,772,538.49, it was submitted for the defendants that KFM had paid RM385,879.20. It was further submitted, this means that KFM had paid RM135,879.16 in excess.

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[13] On the second ground, it was submitted the plaintiff has shown uncertainty about the applicable interest rates by pleading different rates in their documents and as to the types of facilities granted to KFM, and made unlawful, wrongful and illegal claims for interest beyond what was agreed and without any notice whatsoever to KFM or the defendants; and has attempted to impose penalty interest charges retrospectively. It was submitted for the defendants that the plaintiff failed to take account of the fact that the bankers' acceptances had different maturity dates and interest rates and in para 14(ii) of the 3rd affidavit of Mr Lee, the plaintiff admitted its error. It was also submitted the letter of demand of 31 May 2004 stated "Import Line – 3.5% + BLR from

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A 24 May 2003”, and “Term Loan – 3.0% + BLR from 24 May 2003” when the letter of indulgence dated 19 November 2003 only imposed interest at 2% per annum from 20 November 2003 until the date of full settlement. It was submitted there was manifest error in the calculation as to the debt.

B [14] On the third ground, it was submitted the plaintiff did not
C file a suit for recovery of the loans from KFM the borrower, but only against the guarantors/defendants. The defendants say the terms of the guarantees were never explained to the defendants and it was the defendants understanding that only after the disposal of KFM’s Assets would any demand be made against them. They say the plaintiff who is in possession of securities has not realized the same but filed this suit with the sole intention of victimizing the defendants. For example, they say the plaintiff also
D has a charge over property held under GM 57, Lot 841, Mukim Damansara (“the property”) which has not been realized till to date, valued at approximately RM6.5 million proposed for disposal to a purchaser, one Zaharen bin Zakaria, while the suit against the defendants is for a sum of RM1,772,538.49 as at 23 May 2004.
E It was submitted, the sale and purchase agreement for the property was forwarded to the plaintiff sometime October 2004, but the plaintiff requested it be permitted to try and obtain a higher price and to appoint its own agent to effect the disposal.

F **The Law**

[15] The sole ground in an application for leave to enter summary judgment under O. 14 r. 1(1) is that defendant has no defence to a claim included in the writ, or to a particular part or such a claim or has no defence to such a claim or part except as
G to the amount of any damages claimed. The summary judgment is as to liability, while the amount of damages is a matter to be assessed. Under O. 14 r. 4(1) preserves the right of the defendant to defend:

H (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

[16] Order 14 then goes on to provide:

I (3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

[17] It is trite that in an O. 14 application, the defendant needs only raise one triable issue. The key is that it must be a triable issue. That there must be a triable issue does not mean it is a case that must necessarily lead to a trial where witnesses are called, examined, cross-examined and re-examined before proceeding to a hearing of submissions. A “triable issue” is a dispute of a particular fact which might not necessarily require a trial but would require the discovery and interrogatory procedures available after close of pleadings and before a trial that enables the parties to be able to: (a) identify disputes, (b) specify the particulars of the dispute and (c) verify the evidence relied upon in respect of a disputed particular fact to ensure the court always has its facts right. If a point is merely arguable, such as a question of law or an inference or conclusion of fact based on particulars that are not disputed, then it is a point for submissions in a hearing, can be dealt with in the O. 14 application itself and does not constitute a triable issue capable of denying summary judgment to the plaintiff. The case of *Arab-Malaysian Finance Berhad v. Mohamed Hussain bin Yehya & Anor* [2001] 1 LNS 31 provides informative reference.

[18] Returning to the case at hand, the orders sought by the plaintiff are:

- a. The sum of RM1,772,538.49 due as at 23 May 2004;
- b. Interest to be calculated as follows:
 - (i) Term Loan – Interest accrues at the rate of 3.0% per annum at monthly rests, from 24 May 2004 till date of full settlement.
 - (ii) Import Line – Interest on past due banker’s acceptances accrues at the rate of 3.5% above BLR (currently at 6.0%) per annum at daily rests, from 24 May 2004 till date of full settlement.
- c. Costs on a solicitor and own client basis; and
- d. Such further and other relief that this Honourable Court deems fit and just to grant.

- A [19] The backdated termination to 23 May 2004 by a notice dated 31 May 2004 is certainly odd, but nothing is shown or submitted as what precise injustice or wrong is occasioned, leading to the conclusion the objection is mere technicality, and is immaterial or insubstantial. The defendants submitted that KFM
- B had made payments in excess of the sums agreed in the letter of indulgence. A letter of indulgence is a letter of indulgence, and is not itself an agreement. It may operate as an estoppel but it does not necessarily mean there is a binding contract. It is also noted that the letter of indulgence is between the plaintiff and the
- C borrower KFM. There is no evidence KFM disputed the default and the termination. The obligations of the defendants in this case arise out of their guarantees which they issued as directors of KFM as a condition imposed by the plaintiff for the purpose of effecting the banking facilities to KFM.

D **The Guarantee**

[20] Under the guarantee the defendants undertook:

- E ... hereby agree to pay to you on demand all sums of money which are now or shall at any time be owing to you anywhere on any account whatsoever whether from the Principal solely or from the Principal jointly with any other person or persons or from any firm in which the Principal may be a partner including the amount of notes or bills discounted or paid and other loans,
- F credits or advances made to or for the accommodation or at the request either of the Principal solely or jointly or of any such firm as aforesaid or for any money for which the Principal may be liable as surety or in any other way whatsoever together with in all the cases aforesaid all interest, discount and other bankers' charges including legal charges occasioned by or incident to this
- G or any other security held by or offered to you for the same indebtedness or by or to the enforcement of any such security.

[21] As to the amount due, it was provided:

- H 5. A certificate signed by your duly authorised Officer as to the amount at any time owing by the Principal to you shall be conclusive evidence as against us, our executors, administrators and legal representatives of the amount so owing.

- I [22] It is not disputed a demand had been made upon the defendants. A Certificate of Indebtedness as on 23 May 2004 was issued under the hand of one Lee Lay Keng, the Corporate Recovery Manager of the plaintiff. It is established law that a

covenanted certificate of indebtedness is conclusive evidence of the liability and the amount a borrower has to pay, unless there is manifest error in it *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 690 CA; *Bangkok Bank Ltd v. Cheng Lip Kwong* [1990] 1 CLJ 1017; [1990] 3 CLJ (Rep) 523 HC. Since neither his identity nor capacity is disputed, then accordingly the sum certified, totalling RM1,772,538.49 is proven conclusively according to the terms of the defendants' guarantees, and they cannot resile from it.

[23] On the question of manifest error, and while the interest rates stated in the certificate and the claim differ from the rates in the letter of offer, a perusal of the letter of offer shows a clear and unequivocal qualification that the rates are "subject to fluctuations at our absolute discretion and payable ...". The intent for an absolute discretion is underscored by the fact no provision for prior written notice is made. Hence, the ground on this point must fail.

[24] On the last ground raised, it is clear there is no provision in the guarantee that requires the plaintiff to have first exhausted rights on the security it had obtained. It is not law that a plaintiff and holder of security must first commence foreclosure proceedings: *Bank Bumiputra (M) Berhad v. Esah Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41; *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36.

[25] For the foregoing reasons the appeal was allowed with costs.